ABIGROUP CONTRACTORS PTY LTD V RIVER STREET DEVELOPMENTS PTY LTD [2006] VSC 425
Supreme Court of Victoria – 10 November 2005

FACTS

Abigroup Contractors Pty Ltd ("Abigroup") entered into a construction contract with River St Developments Pty Ltd ("RSD") under which Abigroup was to design and construct the Riviera Apartments at 69-73 River St, Richmond for the sum of $68,654,467. Abigroup faxed Progress Claim No 26 made under the *Building and Construction Industry Security of Payment Act 2002* (VIC) ("the Act") in the sum of $4,736,535.97 to the Quantity Surveyor, who was responsible for valuation under the Contract, and also faxed a copy to the Superintendent. The Quantity Surveyor responded by sending to Abigroup Payment Certificate No 26 which certified the amount of $154,185 as due for payment and showing how that amount was calculated.

Abigroup claimed that the Payment Schedule did not meet the requirements of section 15(3) of the Act that the payment schedule "indicate" RSD's reasons for withholding payment, and commenced proceedings in the Supreme Court under sections 15(4) and 16(2)(a) of the Act to recover the amount of the $4,736,535.97 as a debt due to Abigroup.

ISSUES

Was Abigroup entitled to recover the amount of its payment claim as a debt due to it pursuant to section 16(2)(a) of the Act?

FINDING

The Court confirmed that the test for summary judgment is whether or not there is a "real question to be tried". The Court found that RSD had raised several real questions to be tried, most significantly the question as to whether the claim, which was served on the Quantity Surveyor rather than RSD directly, was served in accordance with the Act and the question of whether RSD's payment certificate was a payment schedule for the purposes of the Act.

QUOTE

Habersberger J stated [at 34] that:

> Rule 22.06(1)(b) of the Supreme Court (General Civil Procedure) Rules 2005 provides that on the hearing of a summary judgment application the Court may give such judgment for the plaintiff against the defendant on the claim or part of the claim in question as is appropriate "unless the defendant satisfied the Court that in respect of that claim or part a question ought to be tried or that there ought to be some other reason to a trial of that claim or part".

Habersberger J held [at 81] that:

> Having carefully considered each of the issues discussed above, I have concluded that it is not possible to say that I am left in no doubt on the whole of the material that there are no real questions to be tried. In particular, I consider that each of the issues of "Service", "The Payment Claim", "No Payment Schedule" and "A Superseded Payment Claim" definitely raises a real question to be tried. In reaching that conclusion I have borne in mind Mr Burnside's exhortation not to overlook that any judgment, whether summary or not, is only provisional pending the final determination of the right of the parties. Nevertheless, this does not seem to me to be an appropriate case for summary judgment.

IMPACT

This case confirms the Victorian Supreme Court's position that recovery of the claimed amount as a debt due pursuant to section 16(2)(a) of the Act is only possible where there is no real question to be tried.

NSW
Jim Doyle
P: 02 9283 5388
E: jdoyle@doylesconstructionlawyers.com

QLD
Frank Nardone
P: 07 3034 3333
E: fnardone@doylesconstructionlawyers.com

VIC
Vinodhini Krisnan
P: 03 9620 0322
E: vkrisnan@doylesconstructionlawyers.com

www.doylesconstructionlawyers.com